



AP 1761 \$

TRANSMITTAL OF APPEAL BRIEF (Large Entity)	Docket No. 112701-029
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Re Application Of: May et al.

Serial No. 09/230,623	Filing Date June 14, 1999	Examiner Steve Weinstein	Group Art Unit 1761
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Invention: **MULTI-LAYERED CANNED PET FOOD**

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TO THE COMMISSIONER FOR PATENTS:

Transmitted herewith in triplicate is the Appeal Brief in this application, with respect to the Notice of Appeal filed on June 9, 2003

The fee for filing this Appeal Brief is: **\$320.00**

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Signature

Dated: **August 8, 2003**

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appellants: May et al.
Appl. No.: 09/230,623
Conf. No.: 4102
Filed: June 14, 1999
Title: MULTI-LAYERED CANNED PET FOOD
Art Unit: 1761
Examiner: Steve Weinstein
Docket No.: 112701-029

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Commissioner for Patents
Washington D.C. 20231

APPELLANTS' APPEAL BRIEF

Dear Sir:

Appellants submit this Appeal Brief in support of the Notice of Appeal filed on June 9, 2003. This Appeal is taken from the Final Rejection dated February 7, 2003.

I. REAL PARTY IN INTEREST

The real party in interest for the above-identified patent application on Appeal is Nestec S.A., by virtue of an Assignment executed on January 14, 1999 and January 19, 1999, and recorded at the United States Patent and Trademark Office at Reel 10031, Frame 0067.

II. RELATED APPEALS AND INTERFERENCES

Appellants do not believe there are any known appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision with respect to the above-identified Appeal.

III. STATUS OF THE CLAIMS

Claims 1-10 are pending in this application. A copy of appealed Claims 1-10 is attached in the appendix. In the Final Office Action dated February 7, 2003, Claims 1-10 stand rejected under 35 U.S.C. § 103 as being unpatentable over European Patent No. EP 0 769 252, ("*Ohba*") in view of U.S. Patent No. 5,792,504, ("*Poppel*") and Appellants' alleged admissions or vice versa and further in view of U.S. Patent No. 4,328,254 ("*Waldburger*"), U.S. Patent No. 4,574,174 ("*McGonigle*"), U.S. Patent No. 3,244,537 ("*Cease*"), U.S. Patent No. 2,768,086 ("*Bliley*"), U.S.

Patent No. 2,005,245 ("*Stover*"), U.S. Patent No. 3,681,094 ("*Rogers*"), European Patent Document No. 361,893 ("*Docker*"), Great Britain Patent No. 1,327,351 ("GB '351"), Japanese Patent No. 59-31,677 ("*QP Corp. '677*"), Japanese Patent No. 61-100,174 ("*QP Corp. '174*"), European Patent No. 675,046 ("*Errass*") and Great Britain Patent No. 1,486,634 ("*Henkel*"). A copy of the Final Office Action is appended hereto as Exhibit A of the Supplemental Appendix. The Examiner also makes the final rejection on the basis of arguments made in office actions mailed on August 29, 2000 (Paper No. 5), April 3, 2001 (Paper No. 8), December 12, 2001 (Paper No. 11), and July 31, 2002 (Paper No. 17), copies of which are appended hereto in Exhibit B. A copy of each of the cited references is appended hereto in Exhibits C-P.

IV. STATUS OF THE AMENDMENTS

Appellants submitted an Amendment After Final on April 10, 2002 along with a Request for Continued Examination in response to the Final Office Action dated December 12, 2001 (See, Exhibit B). The amendments were entered and examined in the Office Action that issued on July 31, 2002 (See, Exhibit B).

V. SUMMARY OF THE INVENTION

The present invention generally relates to pet foods. More specifically, the present invention relates to canned pet food products which contain layers of different appearance and texture and processes for producing same. (Specification, page 1, lines 3-5.)

Canned pet foods are traditionally available in two forms, meatloafs and chunk-type products. The meatloafs are particularly well known. They are usually prepared by comminuting raw meat material and mixing it with water, salt, spices, curing agents, gelling agents and, if necessary, fats to provide a batter. The batter is then heated. The heated batter is then filled into cans to form, after retorting and cooling, a meatloaf. (Specification, page 1, lines 7-12.)

The meatloaf products are popular. However, they are in the form of a uniform, homogenous mass which lacks the striated and chunky appearance of meat. This may be a disadvantage for pet foods since a meat-like appearance can greatly enhance consumer acceptability. (Specification, page 1, lines 13-18.)

Known chunk-type products overcome this problem since they are formulated emulsions which simulate the appearance of meat. The formulated meat emulsion may be produced by forming a meat emulsion from a meat source. Dry ingredients such as dry proteinaceous materials (for

example, wheat gluten and soy flour), vitamins, minerals and the like are then mixed into the meat emulsion to provide a viscous emulsion. The viscous emulsion is then run through a high-speed emulsion mill or similar device in which the emulsion is heated. Upon heating, the protein in the emulsion coagulates to form a solid emulsion product. The solid emulsion product is then cut into chunks. The chunks are highly striated and resemble natural meat products in appearance and texture. (Specification, page 1, lines 19-31.)

Canned pet food products which are a combination of the meatloafs and chunk-type products are also known. These products are formed from a matrix of meatloaf surrounding pieces of formulated emulsion products. (Specification, page 2, lines 3-5.)

The present invention provides improved canned pet food products and methods of producing same. In an embodiment, the present invention provides a canned pet food product that includes a base layer including solid food pieces in a gravy wherein the gravy includes about 20% to about 40% by weight of the base layer. The canned pet food products of the present invention further include an upper layer including a substantially solid foodstuff which is about 20% to about 80% by weight of the pet food product wherein the base layer and the upper layer remain stratified before serving and the upper layer supports the base layer upon inversion. (Specification, page 2, lines 10-20.)

The present invention also provides improved methods of manufacturing canned pet food products. In an embodiment, the present invention provides a process for producing a canned pet food product that has at least two layers. The process includes filling a base layer including solid food pieces in a gravy into a can wherein the gravy has a viscosity in the range of about 350 to about 1000 centipoise and forming about 20% to about 40% by weight of the base layer. The process further includes filling an upper layer into the can wherein the upper layer includes a settable foodstuff that has a viscosity in the range of about 2500 to about 4000 centipoise and, upon cooling, forming a substantially solid foodstuff that includes about 20% to about 80% by weight of the upper and base layers and wherein the base layer and the upper layer remain stratified in the can and the upper layer supports the base layer upon inversion. (Specification, p. 3, lines 12-27.)

Often, after opening a can of pet food, the consumer shakes the contents out into the bowl or dish of the pet. Therefore, what was the base layer becomes the upper layer in the bowl or dish of the pet. The consumer is therefore presented with an attractive topping of solid food pieces in a

gravy above a clearly defined layer of a substantially solid foodstuff. (Specification, page 2, lines 18-22.)

Preferably, the solid food pieces in the base layer are a formulated emulsion product having the striated appearance of natural meat. The formulated emulsion product preferably includes about 65% to about 95% by weight of a meat material and about 5% to about 35% by weight of a proteinaceous material. If desired, the formulated emulsion product may be in the form of flakes. (Specification, page 2, lines 23-27.)

The gravy preferably includes water and about 2% to about 8% by weight of starch, for example, about 4% by weight of starch. The starch is preferably a heat-sensitive starch such that its viscosity increasing properties are reduced after being heated. In particular, it is preferred that the gravy has an initial viscosity in the range of about 350 to about 1000 centipoise prior to retorting of the can but a lower viscosity after retorting. (Specification, page 2, lines 28-33.)

The base layer preferably has a moisture content of about 60% to about 70% by weight. In an embodiment, the base layer has a moisture content of about 62% to about 64% by weight, for example, about 63% by weight. (Specification, p. 3, lines 1-3.) The substantially solid foodstuff is preferably a gelled meatloaf, cooked rice, cooked noodles, or aspic, or mixtures thereof. The aspic may contain food pieces, such as cooked vegetable pieces. (Specification, page 3, lines 10-12.)

To produce the pet food product, a mixture of solid food pieces in a gravy and a settable foodstuff must be separately prepared. The mixture of solid food pieces in a gravy may be prepared by simply mixing together solid pieces of meat or other material, or both, and a gravy. The meat material may be any suitable meat source, for example, muscular or skeletal meat, meat by-products or a mixture of meat and meat by-products. The meat material may be in the form of chunks or may be in the form of flakes. However, if a meat material is used, it is preferred that the solid food pieces are a formulated emulsion product. Solid pieces of other material may also be used, such as cooked rice grains, pasta or noodles, vegetable pieces, and the like. (Specification, page 4, lines 3-10.)

The gravy or sauce is produced from water, starch and suitable flavoring agents and should include about 20% to about 40% by weight of the mixture of solid pieces in gravy. The amount of starch used is sufficient to provide a gravy with a viscosity of about 350 to about 1000 centipoise, such as up to about 8% by weight of the starch. The starch is preferably such that its viscosity

increasing properties break down during retorting of the canned pet food. (Specification, page 6, lines 6-12.)

The substantially solid foodstuff can be a gelled meatloaf prepared by emulsifying a suitable meat material to produce a meat emulsion. The meat material may be any suitable meat source. Suitable gelling agents, thickening agents, and other ingredients, such as sugar, salt, spices, seasonings, and minerals may also be added to the meat emulsion. (Specification, p. 6, lines 23-34.) Alternatively, the substantially solid foodstuff may be made of an aspic, cooked rice, or cooked noodles. (Specification, page 7, lines 10-26.)

The mixture of the solid food pieces and gravy and the settable foodstuff is then fed to suitable filling machines. For example, one machine is used for filling the solid food pieces in gravy, and another machine is used for filling the settable foodstuff. A metered amount of the mixture of the solid food pieces in gravy is fed into each can entering the pocket filler in a defined layer that includes about 20% to about 80% of the volume or weight of the product. For example, the layer may make up about 30% to about 70% of the volume or weight of the product. The cans are then fed to a separate filling machine for filling the settable foodstuff. (Specification, page 8, lines 7-13.)

Due to the density and viscosity of the mixture of the solid food pieces and gravy and the density and viscosity of the settable foodstuff, clear and distinct layers are formed in the can despite the spinning. These layers remain clear and distinct during the seaming of the cans. After it has cooled, the settable foodstuff will form a firm, substantially solid foodstuff. (Specification, page 8, lines 13-18.)

The cans are then retorted under conditions of sufficient heat to effect commercial sterilization in the normal manner. During the retorting operation, the starch in the gravy preferably breaks down such that the previously viscous gravy takes on the appearance of a thin, running sauce. (Specification, page 8, lines 19-23.)

The cans produced by the process contain a product, which includes a lower layer of solid pieces of food in a thin sauce, and an upper layer of a substantially solid foodstuff. The layers are clear and distinct and the product is visually attractive once removed from the can. (Specification, page 8, lines 24-27.)

Specific examples of the canned pet food according to an embodiment of the present invention were also provided. (Specification pages 8-10.)

VI. ISSUES

The issue on Appeal is as follows:

1. Would the canned pet food products and processes for producing same as defined by Claims 1-10 have been obvious at the time of the invention to one of ordinary skill in the art under 35 U.S.C. § 103(a) in view of *Ohba*, *Poppel*, Appellants' alleged admissions and further in view of *Waldburger*, *McGonigle*, *Cease*, *Bliley*, *Stover*, *Rogers*, *Docker*, GB '351, *QP Corp.* '677, *QP Corp.* '174, *Errass* and *Henkel*?

VII. GROUPING OF THE CLAIMS

Appellants argue for the separate patentability of each of the independent claims separate and apart from each other set forth in detail below pursuant to the requirements of 37 C.F.R. §1.192(7), unless otherwise specified.

VIII. ARGUMENT

A. The Claimed Invention -- Independent Claim

On appeal, Claims 1 and 10 are the sole independent claim. Independent Claims 1 and 10 are provided below as follows:

Independent Claim 1 recites a canned pet food product that includes a base layer including solid food pieces in a gravy wherein the gravy includes about 20% to about 40% by weight of the base layer. The canned pet food further includes an upper layer that includes a substantially solid foodstuff which is about 20% to about 80% by weight of the pet food product, wherein the base layer and the upper layer remain stratified before serving and the upper layer supports the base layer upon inversion.

Independent Claim 10 recites a process for producing a canned pet food product having at least two layers. The process includes filling a base layer including solid food pieces in a gravy into a can wherein the gravy has a viscosity in the range of about 350 to about 1000 centipoise and forming about 20% to about 40% by weight of the base layer; filling an upper layer into the can, wherein the upper layer includes a settable foodstuff that has a viscosity in the range of about 2500 to about 4000 centipoise and, upon cooling, forming a substantially solid foodstuff, wherein the settable foodstuff includes about 20% to about 80% by weight of the upper and base layers and wherein the base layer and the upper layer remain stratified in the can and the upper layer supports the base layer upon inversion; sealing the can; and retorting the sealed can.

B. The Rejection

Claims 1-10 have been rejected under 35 U.S.C. § 103(a). The Patent Office essentially asserts that the combination of references discloses or suggests each of the features of the claimed invention. In this regard, the Patent Office principally relies on *Ohba*, *Poppel*, and Appellants' alleged admissions and therefore relies on the combined teachings of *Waldburger*, *McGonigle*, *Cease*, *Bliley*, *Stover*, *Rogers*, *Docker*, GB '351, *QP Corp.* '677, *QP Corp.* '174, *Errass* and *Henkel* to remedy the deficiencies of the primary references.

C. The Patent Office Has Failed to Establish a *Prima Facie* Case of Obviousness

Appellants respectfully submit that the rejection of Claims 1-10 under 35 U.S.C. § 103(a) should be reversed based on the fact that the Patent Office has failed to establish a *prima facie* case of obviousness. Appellants submit that the cited references, even if combinable, fail to disclose or suggest the claimed invention. Further, Appellants believe that the Patent Office has relied on hindsight reasoning to justify the combination and/or modification of the cited art to allegedly arrive at the claimed invention.

1. The Applicable Law

The Federal Circuit has held that the legal determination of an obviousness rejection under 35 U.S.C. § 103 is:

whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made...The foundational facts for the *prima facie* case of obviousness are: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; and (3) the level of ordinary skill in the art...Moreover, objective indicia such as commercial success and long felt need are relevant to the determination of obviousness...Thus, each obviousness determination rests on its own facts.

In re Mayne, 41 U.S.P.Q.2d 1451, 1453 (Fed. Cir. 1997).

In making this determination, the Patent Office has the initial burden of proving a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993). This burden may only be overcome "by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings." *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988). "If the examination at the initial stage does not produce a *prima facie* case of

unpatentability, then without more the applicant is entitled to grant of the patent.” *In re Oetiker*, 24 U.S.P.Q.2d 1443, 1444 (Fed. Cir. 1992).

Further, the Federal Circuit has held that it is “impermissible to use the claimed invention as an instruction manual or ‘template’ to piece together the teachings of the prior art so that the claimed invention is rendered obvious.” *In re Fritch*, 23 U.S.P.Q.2d 1780, 1784 (Fed. Cir. 1992). “One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.” *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

Moreover, the Federal Circuit has held that “obvious to try” is not the proper standard under 35 U.S.C. §103. *Ex parte Goldgaber*, 41 U.S.P.Q.2d 1172, 1177 (Fed. Cir. 1996). “An-obvious-to-try situation exists when a general disclosure may pique the scientist curiosity, such that further investigation might be done as a result of the disclosure, but the disclosure itself does not contain a sufficient teaching of how to obtain the desired result, or that the claim result would be obtained if certain directions were pursued.” *In re Eli Lilly and Co.*, 14 U.S.P.Q.2d 1741, 1743 (Fed. Cir. 1990).

2. The § 103 Rejection of Claims 1-10 Should Be Reversed Because the Patent Office
 has Failed to Establish a *Prima Facie* Case of Obviousness

Appellants respectfully submit that the Patent Office has failed to establish a *prima facie* case of obviousness with respect to the rejection of Claims 1-10 under 35 U.S.C. § 103. At the outset, Appellants submit that the references, even if combinable, are deficient with respect to the canned pet food product features of the claimed invention, such as the definable base and upper layers that include solid food pieces in gravy and substantially solid foodstuff, respectively. Further, Appellants believe that the Patent Office has relied on hindsight reasoning to justify the combination and/or modification of the cited art. Indeed, the Patent Office has relied on fourteen references in addition to Appellants’ alleged admissions to support the obviousness rejection. Therefore, Appellants submit that the references, alone or even if combinable, fail to disclose or suggest the claimed invention as required by Claims 1-10.

a. The Canned Pet Food Features of the Claimed Invention

Of the pending claims, claims 1 and 10 are the sole independent claims. Independent claim 1 relates to a canned pet food product. The canned pet food product includes a base layer and an upper layer. The base layer includes solid food pieces in a gravy wherein the gravy includes about 20% to about 40% by weight of the base layer. The upper layer includes a substantially solid foodstuff which is about 20% to about 80% by weight of the pet food product wherein the base layer and the upper layer remain stratified before serving and the upper layer supports the base layer upon inversion.

Claim 10 relates to a process for producing a canned pet food product having at least two layers. The process includes the steps of filling a base layer and an upper layer into the can; sealing the can; and retorting the sealed can. The base layer includes solid food pieces in a gravy wherein the gravy has a viscosity ranging from about 350 to about 1,000 centipoise and forming about 20% to about 40% by weight of the base layer. The upper layer includes a settable foodstuff that has a viscosity ranging from about 2500 to about 4000 centipoise. Upon cooling, a substantially solid foodstuff is formed wherein the settable foodstuff includes about 20% to about 80% by weight of the upper and base layers and the base layer and the upper layer remain stratified in the can such that the upper layer supports the base layer upon inversion.

The present invention provides improved canned pet food products and methods of producing same wherein the canned pet food products have clearly definable base and upper layers that provide an interesting and attractive presentation once removed and upon inversion of the layers from the can. In this regard, the solid foodstuff upper layer is more stable than the base layer that includes solid food pieces in gravy. This allows the solid food pieces in gravy to be deposited on the solid foodstuff upper layer upon removal from the can, thus minimizing the creation of a mess due to removal of same, such as splattering of gravy if the order of the layers were reversed. Again, the canned pet food product provides an attractive presentation once deposited from the can and thus acts to stimulate interest in same.

b. The Cited References are Deficient with respect to the Canned Pet Food Features of the Claimed Invention

Appellants believe that the cited art, even if combinable, fails to disclose or suggest the claimed invention. For example, nowhere does the cited art disclose or suggest canned pet foods that

include a base layer with solid food pieces in a gravy and an upper layer with a substantially solid foodstuff wherein the base layer and the upper layer remain stratified before serving and wherein the upper layer supports the base layer upon inversion.

At the outset, the Patent Office has primarily relied on *Ohba* and *Poppel* and further in view of Appellants' alleged admissions in support of the obviousness rejection. Clearly, the primary references, even if combinable, are deficient with respect to the claimed invention. For example, the primary emphasis of *Ohba* relates to a canned pet food that includes substantially homogeneous food types. In this regard, *Ohba* discloses a pet food packaged in a hermetically sealed container with two or more food types stored within the container in layers oriented along a vertical or horizontal axis. In Figure 1, the substantially homogeneous food type layers are oriented along a vertical axis and include beef (A) and chicken (B). In Figure 2, three substantially homogeneous layers of different food types are packaged in the can along a horizontal axis. The substantially homogeneous food type layers include beef (A), sole (B), and porgy (C).

This clearly contrasts the claimed invention to the extent that *Ohba* effectively teaches away from same. Indeed, the claimed pet food products include an upper layer with a substantially solid foodstuff and a non-homogeneous base layer that includes solid food pieces in gravy. As previously discussed, this provides an attractive presentation of the base layer deposited on the upper layer once removed from the can. This also allows the solid food pieces in gravy layer to be removed effectively without creating a mess due to, for example, splashing of the gravy as the substantially solid foodstuff layer is more stable than the gravy and thus can provide support of same.

Even if combinable, the alleged teachings of *Ohba* and *Poppel* are still deficient with respect to the claimed invention. The primary focus of *Poppel* relates to a process for the production of a formulated emulsion product that has a meat-like appearance. See, *Poppel*, column 1, lines 6-8. In this regard, *Poppel* further discloses that the addition of alkaline greatly increases viscosity of the emulsion and permits the production of formulated emulsion products of higher moisture content. See, *Poppel*, column 2, lines 11-14.

The emulsion products can be formulated into chunks as further disclosed in columns 5 and 6 of *Poppel*. The chunks may be made into chunk-in-gravy type products or loaf-type products. But, nowhere does *Poppel* disclose or suggest layering the chunk-in-gravy products or loaf-type products with other food products to provide a canned pet food product, let alone a canned pet food

product that has a stratified upper layer of solid foodstuff and a base layer of solid food pieces in gravy where the upper layer supports the base layer upon inversion of the can as required by the claimed invention.

At most, the combined teachings of *Ohba* and *Poppel* provide a pet food product that has multiple layers of substantially the same appearance and texture, such as multiple layers of substantially homogenous food type layers as disclosed in *Ohba* or multiple chunk-in-gravy type or loaf type layers as disclosed in *Poppel*. Nowhere do *Ohba* or *Poppel* suggest layering clearly definable (e.g., stratified) layers of products of different appearance and texture, such as the solid food pieces in gravy base layer and substantially solid foodstuff upper layer of the claimed canned pet foods. Further, nowhere do *Ohba* or *Poppel* disclose or suggest inversion of the layers to provide a visually-pleasing pet food product once removed from the can as required by the claimed invention.

Indeed, *Poppel* does not even suggest providing a multi-layered pet food product as previously discussed. Again, *Ohba* teaches away from a stratified homogenous upper layer (e.g., substantially solid foodstuff) and the non-homogenous base layer (e.g., solid food pieces in gravy) wherein, upon serving, the upper layer supports the base layer, thus providing an attractive presentation that can stimulate interest in same as required by the claimed invention. Therefore, Appellants believe that *Ohba* and *Poppel* are clearly deficient with respect to the claimed invention.

Further, the Patent Office's reliance on Appellants' alleged admissions does not remedy the deficiencies of *Poppel* and *Ohba*. Contrary to the Patent Office's position, the meatloaf products and chunk-type products as disclosed in Appellants' Specification are meatloaf products that encase or surround the chunk-type products (e.g., formulated emulsion products) and thus does not disclose or suggest a canned pet food product that has separate and definable layers, let alone that has separate and definable upper and base layers that are inverted upon removal to provide an attractive presentation of the pet food product as required by the claimed invention. Based on at least these reasons, Appellants believe that, even if combinable, *Ohba*, *Poppel*, and Appellants' alleged admissions are clearly deficient with respect to the claimed invention.

Moreover, Appellants do not believe that the remaining references, even if combinable, can be relied on to remedy the deficiencies of *Ohba*, *Poppel* and Appellants' alleged admissions. At the outset, nowhere does *Docker* disclose or suggest an upper layer of substantially solid foodstuff and a base layer of solid food pieces in a gravy such that upon inversion the upper layer supports the base

layer.

To the contrary, *Docker* discloses a pudding-type layer as the base layer in the can wherein the top layer includes a liquid layer prior to serving. The container is then lifted from the tableware such that the liquid and solid layers can be removed from the bottom of the container as shown in Figure 3. In this regard, the bottom solid layer emerges first from the container as the bottom of the can is opened. See, *Docker*, column 4, lines 1-7. This clearly teaches away from inversion of the layers upon serving as required by the claimed invention.

Referring to Figure 2, *Docker* clearly illustrates that the can can also be designed to have a bottom liquid constituent emerge first therefrom and then have the solid plop onto it. The plopping of the solid onto the liquid can cause the liquid layer to splash, thus creating a mess. This also is a clear teaching away from the claimed invention which requires inversion of solid food pieces in gravy in a base layer onto a solid foodstuff upper layer before serving. As previously discussed, the solid foodstuff layer is more stable than the base layer that includes solid food pieces in gravy and thus can reduce the risk of creating a mess upon opening the can because the solid foodstuff layer is deposited from the can first and the solid pieces in gravy are then deposited on the solid layer rather than in reverse order.

With respect to *Waldburger*, Appellants question the applicability of this reference with respect to the claimed invention. *Waldburger* merely relates to frozen food products that can be heated in a container and ready to serve. See, *Waldburger*, Abstract. Indeed, the *Waldburger* product is useful in hospitals and other institutions for the efficient and aesthetic purveying of standardized meals made up of several different hot dishes, such as an entrée and assorted vegetables but clearly not pet food. *Waldburger*, col. 1, lines 7-12. Therefore, Appellants question why one skilled in the art would even consider this reference in an attempt to remedy the deficiencies of the other cited references.

The remaining references also do not remedy the deficiencies of the other references discussed above. The *GB '351* reference does not disclose or suggest a layered structure. The primary focus of *GB '351* relates to the injection of an egg into a meat product. Indeed, the meat product completely surrounds the egg, and thus clearly does not provide stratified upper and baser layers, let alone a solid foodstuff upper layer and a solid food pieces in gravy base layer as required by the claimed invention. See, *GB '351*, p. 2, lines 17-28.

The *QP Corp* references are concerned with bread-spread compositions (e.g., peanut butter, chocolate, and other oily spreading food) in a container and not pet food products as required by the claimed invention. By definition the spreads would be removed in small, discrete quantities. Thus, the issues that are faced by the claimed invention in providing a complete meal that can be attractively dispensed in its entirety from a can are not a concern with these references. Indeed, these references, at most, suggest placing the food in an attractive position within the container and thus are not concerned with the presentation of the product once removed from the can, such as the attractive presentation of the solid food pieces in gravy base layer deposited on the solid foodstuff upper layer upon removal from the can as required by the claimed invention.

With respect to *QP Corp* ('677), the viscosity of the components are much greater than the viscosity of the components of the claimed invention. Thus, this product will not easily release from the can and must be withdrawn from the container by scooping small portions out with a suitable utensil. By contrast, the claimed canned pet food products can be dispensed from the container by a simple inversion of the can.

With respect to *Errass*, its clear emphasis relates to a condiment that can be dispensed from a tube. Nowhere does *Errass* disclose or suggest the stratified layering of pet food within a can as required by the claimed invention.

Indeed, the *Henkel* reference relates to a cosmetic and not a food, let alone a pet food as required by the claimed invention. See, *Henkel*, p. 1, lines 6-7. Regardless, this reference fails to disclose or suggest horizontally stratified product layers, let alone stratified pet food layers as required by the claimed invention. See, *Henkel*, Figures.

The primary emphasis of *McGonigle* relates to an apparatus that holds foods to be heated in an oven or microwave. The apparatus includes a compartmentalized lid that is inverted over a reusable dish and placed in an oven or microwave for heating. Foods placed in the lid are placed in an inverted manner. After the food is heated, the apparatus is inverted for serving. See, *McGonigle*, for example, col. 3, line 61 to col. 4, line 18.

However, nowhere does *McGonigle* disclose or suggest an upper food layer which is capable of supporting a base food layer upon inversion, let alone a solid foodstuff upper layer which is capable of supporting a solid food pieces in gravy base layer when inverted upon removal of the canned pet food product as required by the claimed invention. Although *McGonigle* mentions sauces

that are intended to cover an entrée can be placed in the lid first (See, *McGonigle*, col. 3, lines 52-54), clearly this does not suggest that the entrée is capable of supporting the sauce when inverted. In fact, it would be expected that the sauce would inter-mix with the entrée in the lid. Moreover, *McGonigle* discloses the separation of meal components into separate compartments when preparing the meal. See, *McGonigle*, for example, Fig. 1. This clearly teaches away from the stratified food layers, let alone the stratified upper and base pet food layers of the claimed invention.

Cease discloses a holder that receives frozen foods in an inverted manner. The holder is inverted on a service plate. See, *Cease*, for example, col. 1, lines 8-13; and Figures. *Cease* does not mention a canned product, let alone a canned pet food product. Nor does *Cease* mention filling a meal into a single compartment. *Cease* also does not include a gravy containing chunks. Thus, *Cease* is clearly deficient with respect to the claimed invention.

Bliley discloses a method for preparing a frozen food package. A sauce' is placed in a container and frozen. Another food, such as spaghetti, is placed in the same container and the container is again frozen. Upon serving, the container can be heated and inverted. See, *Bliley*, for example, col. 1, lines 22-30; and Figures.

While *Bliley* mentions a base layer and an upper layer, *Bliley* does not mention an upper layer that specifically provides support to a base layer when inverted for serving, let alone a solid foodstuff upper layer and a solid pieces in gravy base layer of the claimed canned pet food product. Further, it would not be expected that the spaghetti and sauce in *Bliley* would remain separate after heating the container. On the contrary, it would be expected that at least some of the sauce would inter-mix with the porous spaghetti strands before and after inversion and thus clearly does not disclose or suggest the stratified upper and base layers of the claimed canned pet food product. Therefore, *Bliley* is clearly deficient with respect to the claimed invention.

Stover discloses an ice cream package and clearly not a canned pet food product as required by the claimed invention. See, *Stover*, col. 1, lines 1-5.

Rogers discloses a food product that has a gravy mixture including gelatin. The gravy mixture is placed in a container. A meat product is placed on top of the gravy mixture. See, *Rogers*, Abstract. This clearly does not suggest the inversion of a food product, let alone a pet food product, when serving same. Moreover, *Rogers* merely suggests that the gelatinized gravy can be utilized to support the meat component (e.g., the meat product can be placed on top of the gelled gravy without

substantial commingling of the meat and gravy products). See, Rogers, Abstract, lines 17-19. Thus, Rogers is clearly deficient with respect to a canned pet food product that includes a solid foodstuff upper layer that can support a solid food pieces in gravy base layer upon inversion of same, thus providing an attractive presentation that can stimulate interest in same as required by the claimed invention.

In view of same, Appellants do not believe that the teachings of the secondary references, even if combinable, are sufficient in scope and detail to remedy the deficiencies of the primary references. What the Patent Office clearly has done is to apply “hindsight reasoning” to support the combinability and/or modification of the cited art to arrive at the claimed invention. Of course, this is improper.

As previously discussed, Appellants have devised a canned pet food product that includes a base layer with solid foodpieces in a gravy and an upper layer that includes a substantially solid foodstuff such that upon inversion the upper layer can support the base layer for serving, thus providing a visually attractive product to facilitate eating thereof. Nowhere do any of the cited references disclose or suggest the specific combination of features of the claimed invention, and nor do they recognize such beneficial effects thereof.

Indeed, the sheer number of references needed to support the Patent Office’s rejection clearly suggests that the rejection is mere hindsight reconstruction of the claimed invention. If it takes this many separate references to piece together the claimed invention, then it must be non-obvious.

Further, the principal references are clearly deficient with respect to the specific features of the claimed invention, to the extent that they effectively teach away from the claimed invention as previously discussed. Nowhere do the teachings of *Ohba* and *Poppel* and further in view of Appellants’ alleged admissions disclose or suggest a canned pet food product that has a solid foodstuff upper layer and a solid foodpieces in gravy base layer such that upon inversion and removal from the can the solid foodstuff layer can support the food pieces in gravy layer, thus making the pet food product more visually attractive for serving and eating purposes as required by the claimed invention. Moreover, Appellants do not believe that the secondary references can be relied upon, alone or in any hypothetical combination, to remedy the deficiencies of the principal references. Indeed, a number of these references do not even relate to pet food products, and at least one (e.g., *Henkel*) clearly does not even relate to food products, let alone pet food products. Based

on at least these reasons, Appellants do not believe that one skilled in the art would be inclined to modify and/or combine the cited art to arrive at the claimed invention.

Therefore, Appellants respectfully submit that the cited art, even if combinable, fails to disclose or suggest the claimed invention as previously discussed, and thus fails to render obvious the claimed invention.

Accordingly, Appellants respectfully request that the rejection of Claims 1-10 under 35 U.S.C. § 103 be reversed.

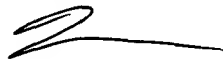
IX. CONCLUSION

Appellants' claimed invention set forth in Claims 1-10 is neither taught nor suggested by the cited references, either alone or in combination. The Patent Office has failed to establish a *prima facie* case of obviousness with respect to the rejection of Claims 1-10. Accordingly, Appellants respectfully submit that the rejection of pending Claims 1-10 as being obvious is erroneous in law and in fact and should therefore be reversed by this Board.

Respectfully submitted,

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APPENDIX

1. A canned pet food product comprising:
a base layer comprising solid food pieces in a gravy, the gravy comprising about 20% to about 40% by weight of the base layer; and
an upper layer comprising a substantially solid foodstuff which is about 20% to about 80% by weight of the pet food product, wherein the base layer and the upper layer remain stratified before serving and the upper layer supports the base layer upon inversion.
2. A product according to claim 1 in which the solid food pieces in the base layer are a formulated emulsion product having the striated appearance of natural meat.
3. A product according to claim 2 in which the formulated emulsion product is in the form of flakes.
4. A product according to claim 1 in which the gravy comprises water and about 2% to about 8% by weight of a heat sensitive starch which undergoes a reduction in its viscosity increasing properties during heating.
5. A product according to claim 1 in which the gravy has an initial viscosity in the range of about 350 to about 1000 centipoise prior to filling of the base layer into the can.
6. A product according to claim 1 in which the base layer has a moisture content of about 60% to about 70% by weight.
7. A product according to claim 1 in the substantially solid foodstuff is a gelled meat loaf, cooked rice, cooked noodles, or aspic, or mixtures thereof.
8. A product according to claim 7 in which the upper layer has a moisture content of about 70% to about 85% by weight.

9. A product according to claim 1 in which the upper layer has a viscosity in the range of about 2500 to about 4000 centipoise during filling of the upper layer into the can.

10. A process for producing a canned pet food product having at least two layers, the process comprising:

filling a base layer comprising solid food pieces in a gravy into a can, the gravy having a viscosity in the range of about 350 to about 1000 centipoise and forming about 20% to about 40% by weight of the base layer;

filling an upper layer into the can, the upper layer comprising a settable foodstuff having a viscosity in the range of about 2500 to about 4000 centipoise and, upon cooling, forming a substantially solid foodstuff, the settable foodstuff comprising about 20% to about 80% by weight of the upper and base layers wherein the base layer and the upper layer remain stratified in the can and the upper layer supports the base layer upon inversion;

sealing the can; and

retorting the sealed can.